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Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1655

HEAVY LIFT SERVICES, INC.
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Heavy Lift Services, Inc., respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit, Case No. 78-2435, entered in this matter on December 5, 1979.

OPINIONS BELOW

The December 5, 1979, Opinion of the Court of Appeals, whose Judgment is sought to be reviewed, is reported at Heavy Lift Services, Inc., 607 F.2d 1121 (1979).

The Opinion of the National Labor Relations Board of February 27, 1978, is incorporated in the Appendix to this Petition (App. A, p. App. 1).

Prior Opinion *NLRB vs. Mansion House Center Management Corporation,* 473 F.2d 471 (C.A. 8, 1973). Also incorporated in the Appendix (App. A, p. App. 38).

JURISDICTION

The Final Judgment of the Fifth Circuit Court of Appeals was entered on January 3, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the due process clause of the Fifth and Fourteenth Amendments of the Constitution will permit the National Labor Relations Board through its three-man panel, and the Administrative Law Judge, to refuse to receive evidence, as detailed in repeated proffers by Heavy Lift Services, Inc., the Petitioner, of post and pre-certification acts and conduct constituting blatant and flagrant racially discriminatory practices engaged in by the Union, International Longshoremen's Association Local 1680, AFL-CIO, when such acts and

conduct clearly adversely affect the right and the capability of the Union to discharge its statutory obligations to represent the employees in the appropriate unit as their exclusive bargaining representative.

2. Whether the refusal of the Administrative Law Judge pursuant to the ruling of October 6, 1975, of the National Labor Relations Board, as affirmed by the Court of Appeals for the Fifth Circuit, to permit Petitioner to submit evidence at the unfair labor practice hearing, of the acts and conduct of International Longshoremen's Union Local 1680, AFL-CIO, constituting blatant and flagrant racial discrimination when such refusal is based upon a procedural point, is a question of importance involving a federal issue seriously affecting the public interest.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Amendment Five — "No person shall be deprived of life, liberty or property, without due process of law."

2. Amendment Fourteen — "No person shall be deprived of life, liberty or property, without due process of law."

STATEMENT OF THE CASE

This case was before the Court of Appeals for the Fifth Circuit on the application of the National Labor Relations Board (Board hereafter) for enforcement of its Order issued against Heavy Lift Services, Inc. (Petitioner hereafter), on February 27, 1978, reported at 234 NLRB No. 164 (807).

I. THE BOARD'S FINDINGS OF FACT

The Board has found that Petitioner violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union. The Union has been previously certified as the exclusive bargaining representative of Petitioner's employees in a representation proceeding.

A. The Representation Proceedings

The Union filed a representation petition with the Board on August 9, 1973; pursuant to a Stipulation For Certification Upon Consent Election approved by the Acting Regional Director of Region 12 on September 17, 1973, an election was conducted by secret ballot on October 26, 1973, under the direction and supervision of the Regional Director. Of 24 eligible voters, 21 cast valid ballots; 11 for and 10 against the Union. One challenged ballot was sufficient to affect the outcome of the election.[1] Petitioner filed timely Objections to Conduct Affecting Results of the Election on November 2, 1973; these objections alleged a Union campaign based upon appeals to racial prejudice that interfered with the election; that employee Joe Jones had so materially misrepresented facts in an ungermane, false and intemperate manner as to inject racial prejudice into the campaign barely more than one day before the election (at a time that, under the law, Petitioner could not effectively reply) and accordingly that Jones's remarks had made free choice by the eligible employees in the

[1]This ballot was cast by former employee Lenny Derewyante, who had been discharged and permanently terminated prior to the election; it was challenged by a Board agent because Derewyante's name did not appear on the voter eligibility list.

pending election impossible; that employee Joe Jones, by his actions and by the Union's failure to rebut those actions, acted as a Union agent; additional objections alleged Union threats of physical harm directed towards employees if they did not vote for the Union. Supplemental Objections were filed on November 15, 1973, alleging the Union's filing of an unfair labor practice charge as to the discharge of an employee Lenny Derywente, on the eve of the election to be an unfair election campaign tactic.[2] Petitioner contended that the Union had misused this charge to mislead the Petitioner's employees, and that, by so doing, the Union had abused the Board's processes. On December 4, 1973, the Petitioner requested investigatory subpoenas to be issued for the specific purpose of establishing, beyond any doubt, the fact that the Union's agents played a vital role in the development of the race issue in the election campaign. This request was refused.

The Regional Director issued his Report on Challenged Ballots and Objections on December 14, 1973, recommending that the Board sustain the challenge to the ballot, overriding the Petitioner's Objections in their entirety, and certifying the Union as the bargaining representative of the employees in the appropriate unit.

Timely exceptions were filed by the Petitioner to the Regional Director's report, alleging, *inter alia*, that a hearing was necessary to resolve substantial and material issues of fact raised with respect to its Objections; on April 9, 1974, the Board issued its

[2]The Union withdrew this charge, with the Regional Director's approval, on November 12, 1973.

Decision and Order directing a hearing as to the Company's objections involving appeals to racial prejudice by the Union and employee, Jones. The Board adopted the Regional Director's recommendation that the challenge to the ballot be sustained, and that the other objections of Petitioner as to threats of physical violence and the filing of the unfair labor practice charge be overruled. Thereafter on April 22, 1974, the Regional Director issued an Order scheduling a hearing on objections for the purpose of receiving evidence to resolve the objections raised by Employer's Objections 2 through 7 inclusive. Pursuant to said Order, a hearing was conducted on May 15 and 16, 1974.

On August 30, 1974, the Hearing Officer issued his Report and Recommendation on Objections, recommending that Petitioner's Objections be overruled, and that an appropriate certification of representation be issued.

The Petitoner submitted a brief to the Hearing Officer and filed Exceptions and a Brief in Support Thereof; the Board isssued its Supplemental Decision and Certificate of Representation adopting the Hearing Officer's findings and certifying the Union on December 2, 1974.

B. The Unfair Labor Practice Proceeding

The Union, by letter on or about January 3, 1975, requested Petitioner to bargain collectively with it as a certified representative of the unit employees; no answer was received by the Union, and on April 15, 1975, the Union filed an unfair labor practice charge alleging

violations of section 8(a)(5) of the Act; Petitioner asserted *affirmative* defenses in that (1) its election objections had been improperly overruled by the Board; (2) that the Board had improperly designated a Hearing Officer to determine disputed questions of fact as to its objections; (3) that the Hearing Officer failed to conduct the hearing in accord with the rules of evidence and applicable law; and (4) accordingly, the Petitioner was denied *due process.*

On June 3, 1975, the General Counsel filed a Motion to Strike Portions of Respondent's Answer and Motion for Summary Judgment, with supporting evidentiary exhibits attached.

On July 8, 1975, the Petitioner filed a Reply in Opposition to the General Counsel's motions.

No affidavits or exhibits were filed in support of the Company's allegation of discriminatory racial practices or any other affirmative defenses.

Petitioner filed an Amended Answer[3] on July 10, 1975 denying having violated the Act, that the Union

[3]Section 102.23, Rules and Regulations and Statements of Procedure, Series 8, as amended, of the Board, does *not* require supporting evidentiary exhibits or affidavits. It states as follows:

> *Amendment.* The respondent may amend his answer at any time *prior* to the hearing. During the hearing or subsequent thereto, he may amend his answer in any case where the complaint has been amended, within such period as may be fixed by the administrative law judge or the Board. Whether or not the complaint has been amended, the answer may, in the discretion of the administrative law judge or the Board, upon motion, be amended upon such terms and within such periods as may be fixed by the administrative law judge or the Board. (Emphasis supplied.)

was a labor organization, that the Union was the exclusive representative of its employees, and affirmatively asserted, in defenses: that the Union had engaged in unlawful, illegal and discriminatory racial practices, thereby disqualifying it from being certified under the Act, and barring it from remedial relief, and further asserting and amplifying defenses originally filed.

The General Counsel did not file a motion for summary judgment directed toward the Amended Answer, nor did it amend its Motion for Summary Judgment to address the Amended Answer.

Therefore, the NLRB did *not* have before it issue joined with respect to the proper pleading inasmuch as the Amended Answer, as a matter of law, supplanted the Answer and was never challenged by a motion, or an amended motion, for summary judgment.

On July 15, 1957, the General Counsel filed a Response to the Petitioner's reply.

Thereafter, a three-man Board panel considered the issues presented on the summary judgment action, and issued an Order on October 6, 1975, denying Petitioner's request for a hearing on its affirmative defense of Union discrimination, and providing that Petitioner's "unsupported allegations . . . , without more, are insufficient to raise factal issues warranting hearing." The Order did provide for a hearing based upon certain disputed factual issues, and remanded the case to the Regional Director.

On December 9, 1975, a hearing was held before an administrative law judge (ALJ hereafter), at which time

Petitioner presented a detailed proffer through the Union's own business agent, Earl Gipson, and proffered the testimony of 11 then-employees of Petitioner, all to prove up the refusal and failure of the Union to dispatch white employees to work Union ships at the Port, giving the specific times and names of the Union ships, and, additionally, statistics to demonstrate the racial imbalance of the Union in comparison to the work force in the area and documentary evidence to demonstrate other various and sundry racially discriminatory practices engaged in by the Union as set forth in the affirmative defenses of Petitioner's Amended Answer.

The proffer was received, but the evidence rejected.

A supplemental offer of proof was submitted on December 26, 1975, and the ALJ also refused to receive the evidence contained in that proffer.

On January 16, 1976, the ALJ issued his Decision. He found that the Union had requested bargaining by letter, that Petitioner did not respond thereto, that Petitioner had refused to bargain with the Union since receipt of the letter, that the Union was a labor organization within the meaning of section 2(5) of the Act, that Petitioner was precluded from attempting to re-litigate issues which could have been, and were previously, determined in the underlying representation proceeding in the absence of newly-discovered or previously-unavailable evidence; he rejected all Petitioner's other affirmative defenses on the grounds that the Company was precluded from litigating its allegations of Union racial discrimination by virtue of the Board Order of October 6, 1975. He thereby

concluded that the Petitioner's activities constituted unfair labor practices in violation of section 8(a)(5) and (1) of the Act. Exceptions were timely filed by the Petitioner to the ALJ's Decision.

II. THE BOARD'S DECISION AND ORDER

On February 27, 1978, the Board (Chairman Fanning, Members Penello and Murphy, with Member Jenkins dissenting) issued its Decision and Order, affirming the rulings, findings, and conclusions of the ALJ, and adopted his recommended order. The decision paid particular attention to the question of admission of evidence of the Union's history of discriminatory activity. The Board briefly summarized the case's history, explaining its reasons for rejecting the proffered evidence of the Union's racially discriminatory activity, and again rejected Petitioner's exhibits and offer of proof. The Board relied in substance on the failure of the Petitioner to offer evidence in support of the discrimination alleged in its Amended Answer (see footnote 3, *supra,* citing the Board's Rules and Regulations and Statements of Procedure, Series 8, as Amended). Again, the Board relied on the fact that the Company had failed to present substantial evidence of this discriminatory activity when it first raised the defense, and that in the absence of newly-discovered or unavailable evidence, the affirmative defense should not be considered. The Board concluded it was unnecessary in its decision to reach the question of the propriety of exploring allegations of invidious union discrimination at that stage of the Board's proceedings. Member Jenkins strongly dissented from the Board's conclusion and ruling, stating that the Petitioner had, on three

occasions, been denied its request for a "day in court" on procedural grounds, thereby effectively holding that the due process clause does not preclude the Board from upholding the certification of, or extending remedial relief to, a discriminating union. Member Jenkins concluded that, when evidence of discrimination comes to the attention of the Board, it is constitutionally mandated to ensure, following *NLRB v. Mansion House Center Management Corporation,* 473 F.2d 471 (C.A. 8, 1973), "That we do not become knowing and willing partners in its perpetuation." Member Jenkins emphasized this conclusion in the case before him, where, from the record, he adduced that substantial allegations of a general pattern of discriminatory conduct and of actual discriminatory representation were evidently available to the Board. Member Jenkins then went on to outline his rationale for not applying the "available evidence" rule, and distinguished the cases relied on by the Board, *Handy Andy, Inc.,* 228 NLRB No. 59 (1977), and *Bell & Howell Co.,* 230 NLRB No. 57 (1977), pointing out that in those cases the union concerned had not had the opportunity of proving itself in its representative capacity, thereby factually distinguishing the instant case.

> In view of this fact, I do not see how we can justify ignoring a constitutional mandate against sanctioning invidious discrimination when faced with substantial allegations of *actual* discriminatory conduct, particularly in the context of an unfair labor practice proceeding and all its attendant procedural safeguards.

Member Jenkins concluded by applying the factual circumstances of the case before him to the Board majority decision that an 8(b) proceeding would be more appropriate, showing how, in this case, such a procedure could not be expeditious, and the attendant dangers of the delays caused thereby.

The Board majority has required the Petitioner to cease and desist from refusing to bargain collectively with the Union. *It has refused to consider Petitioner's exhibits and offers of proof.* Petitioner has still refused to recognize and bargain with this Union, relying on its defenses against representative status and those same defenses as outlined by Member Jenkins' dissent. It was from this ongoing dispute, therefore, that the National Labor Relations Board appealed to the Fifth Circuit Court of Appeals, from whose Decision this Petitioner seeks a Writ of Certiorari to review the constitutional questions.

The issue of the Board's denial of Petitioner's constitutional rights was presented to the Appellate Court in Petitioner's Statement of Issues Presented, and throughout its Brief to the Court of Appeals.

The Fifth Circuit Court of Appeals, by order of December 5, 1979, ruled:

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

HEAVY LIFT SERVICE, INC.,
Respondent.

No. 78-2435.

United States Court of Appeals,
Fifth Circuit.

Dec. 5, 1979

Application for Enforcement of an Order of the National Labor Relations Board.

Before THORNBERRY, GEE and HATCHETT, Circuit Judges.

HATCHETT, Circuit Judge.

The National Labor Relations Board (Board) seeks enforcement of its order finding that Heavy Lift Service, Inc. (Company) refused to bargain collectively with the International Longshoremen's Association, Local 1680, AFL-CIO (Union) as the certified bargaining representative of certain Company employees. Sections 8(a)(5) and (1), National Labor Relations Act; 29 U.S.C. sections 158(a)(5) and (1). We enforce the Order.

Pursuant to a Stipulation for Certification upon Consent Election executed by the Company and the

Union, a ballot election was held resulting in eleven (11) votes for and ten (10) votes against the Union. The Company timely filed objections to conduct allegedly affecting an incident occurring during a Company meeting held on the day before the election. The meeting was convened by the Company president to persuade the employees to reject the Union as their bargaining representative and to answer employees' questions. Responding to the request for comments, black employee Joe Jones arose and, in a loud and excited voice, called the Company president a "nigger hater" and charged the Company with racially discriminatory practices. Jones specifically charged that the Company was hiring white employees and paying them higher wages than black employees who had seniority. The president denied the charges and explained that because of the greater skill required, heavy equipment operators might start at higher salaries than stevedores who had been employed for several years. At the conclusion of the meeting, another black employee invited all the employees to the Union hall after work to learn of the Union's position. The Company's objections cited this incident and other practices to support the allegation that the Union's campaign was based on appeals to racial prejudice and that material misrepresentations of fact vitiated the free-choice of voting employees.

After an administrative investigation of the objections, the regional director recommended that the Board overrule the objections and certify the Union as the exclusive bargaining representative of the employees in the appropriate unit. The Board ordered a hearing before a designated hearing officer on the election

objections. Upon the recommendation of the hearing officer, the Board overruled the objections and certified the Union as the bargaining representative of employees in the unit.

A Board complaint was issued when the Company refused to bargain with the Union. In its answer, the Company denied that the Union had requested bargaining and that the Union was a labor organization within the meaning of section 2(5) of the Act. The general counsel then filed a motion for summary judgment. The Company filed its reply to the general counsel's motion and amended its answer affirmatively asserting that the Union had engaged in discriminatory racial practices, disqualifying it from certification under the Act. No affidavits or exhibits were filed in support of this allegation. The Board denied the Company's request for a hearing on its affirmative defense of Union discriminatory practices, on grounds that "mere unsupported allegations" of Union misconduct "are insufficient to raise factual issues warranting a hearing." Because disputed fact issues were raised as to whether the Union had requested bargaining, the Board remanded the case to the regional director for a hearing on that issue. At the hearing, the administrative law judge refused to admit evidence relevant to the affirmative defense of Union discrimination because the Board had rejected the allegation as unsupported, precluding the Company from litigating the issue. The administrative law judge rejected all other Company defenses and found that it had unlawfully refused to bargain with the Union. The Board affirmed the findings and conclusions of the administrative law judge and adopted his recommended order.

In opposition to enforcement, the Company presents two issues: (I) Whether the Board erred in adopting the administrative law judge's findings and conclusions concerning the election of objections; and, (II) Whether the Board improperly foreclosed the litigation of the defense of Union discrimination.

I.

[1] The Company maintains that on the factual record as a whole the Board's decision is not legally justified. Its major dispute is with the Board finding that the election was not fatally injected with racial prejudice and material misrepresentation. There is, however, substantial record evidence to support the Board's finding. *See, National Labor Relations Board v. Allis-Chalmers Corp.*, 601 F.2d 870 (5th Cir. 1979).

In reviewing the Board's decision, the burden is on the objecting party to demonstrate that the election was not fairly conducted. *Contract Knitter, Inc. v. N.L.R.B.*, 545 F.2d 967 (5th Cir. 1977); *National Labor Relations Board v. Mattison Machine Works*, 365 U.S. 123, 81 S.Ct. 434, 5 L.Ed.2d 455 (1961). Moreover, the Board's long experience in representation matters requires us to give special deference to its decisions regarding the effect of challenged conduct on the results of an election. *National Labor Relations Board v. Leatherwood Drilling Co.*, 513 F.2d 270 (5th Cir. 1975). There is no evidence in the record to show that the employee who complained at the pre-election Company meeting was an agent of the Union or authorized to speak on its behalf. Jones testified that he had never

held any office in the Union, nor had he been given authority to act in any Union capacity. The Union president confirmed this testimony without contradiction. Evidence showed that Jones had attended no more than three of the Union meetings prior to the election. There was no evidence to demonstrate that Jones's comments were ratified or condoned by the Union. On this record, the hearing officer found that Jones was not acting as an agent of the Union. The record supports that finding.

We have held that where "conduct [is] not attributable to the opposing party [it] cannot be relied upon to set aside an election" unless it is so "coercive and disruptive . . . [that] a free expression of choice of representation [is] impossible." *Federal Electric Corporation v. N.L.R.B.*, 539 F.2d 1043, 1044 (5th Cir. 1976); *Bush Hog Inc. v. N.L.R.B.*, 420 F.2d 1266 (5th Cir. 1969). We agree with the Board that Jones's remarks, immediately denied and rebutted by the Company president, under all the circumstances, cannot be said to have "interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election." *National Labor Relations Board v. Golden Age Beverage Co.*, 415 F.2d 26, 30 (5th Cir. 1969); see, *National Labor Relations Board v. Allis-Chalmers Corp.* at 872 n.3.

II.

[2] The administrative law judge cited two reasons for refusing to hear the Company's affirmative defense of racially discriminatory Union practices. First, the Board's previous order denied the Company's

request for a hearing on the issue, because the allegation was not supported by sufficient evidence to overcome a motion for summary judgment. Second, the Company had failed to raise the issue in a prior representation proceeding. The administrative law judge found that absent newly discovered or previously unavailable evidence, the Company could not relitigate issues previously determined in the representation case.

The Board adopted the administrative law judge's decision in full and added a third justification for rejecting the evidence. The Board stated in its final order that it "is not under a constitutional mandate to consider allegations about a Union's discriminatory practices in either a representation proceeding or when raised by a Respondent as an affirmative defense to a complaint charging it with violating the Act by refusing to bargain with the collective bargaining representative of its employees." In support of its position, the Board cited *Handy Andy, Inc.*, 228 NLRB No. 59 (1977) and *Bell & Howell Co.*, 230 NLRB No. 57 (1977).

We affirm on this issue, but only for the first reason expressed by the administrative law judge. A motion for summary judgment puts adverse parties to the test of their allegations prior to a full evidentiary hearing. As the Board noted in its original order denying a hearing on the Union discrimination charges, "mere unsupported allegations of the Union's having engaged in such conduct, without more, are insufficient to raise factual issues warranting a hearing." In its affirmative defense to the motion for summary judgment, the Company failed to support its allegations with the minimal evidence necessary to show that a factual issue

existed to necessitate a hearing Without a "properly substantiated" prima facie showing of racial discrimination by the Union, the Company was not entitled to a hearing on this affirmative defense. *National Labor Relations Board v. Sumter Plywood Corp.*, 535 F.2d 917 (5th Cir. 1976); *National Labor Relations Board v. Bancroft Manufacturing Co., Inc.*, 516 F.2d 436 (5th Cir. 1975). As we held in *Sumter:*

> . . . this Court will deny enforcement of a Board order on the grounds that the Board improperly refused a hearing on whether the union was racially discriminatory only when the employer has proffered specific evidence sufficient to demonstrate a pattern of racially discriminatory behavior by the union which would support a finding of a definite propensity for racially unfair representation.

National Labor Relations Board v. Sumter Plywood Corp., at 931. Had the Company's allegations been supported by specific evidence as required in *Sumter,* the claim of invidious racial discrimination would property have been brought before the Board at the proceedings on the refusal to bargain. See, *National Labor Relations Board v. Mansion House Center Corp.*, 473 F.2d 471 (8th Cir. 1973); *National Labor Relations Board v. Bancroft Manufacturing Co., Inc.*, at 446; *National Labor Relations Board v. Sumter Plywood Corp.*, at 931.

For the above reasons, we enforce the Board's order.

ENFORCED.

The Court of Appeals apparently ignored the constitutional mandate of the Fifth and Fourteenth Amendments and the clear expression of the constitution's intention in this type of situation (*Mansion House, supra.*)

REASONS FOR GRANTING THE WRIT

I

Certiorari should be granted to prevent the Petitioner's deprivation of its constitutional right to due process.

The main issue in this case is not a fact contrived to claim Petitioner's loss of its "day in court," but a clear, factual undisputed set of circumstances which completely precluded the Petitioner from asserting its very real defenses. Thus, the Petitioner, Heavy Lift Services, Inc., was, in fact, deprived of its constitutional right to due process in violation of the Fifth and Fourteenth Amendments.

In arriving at the Board's decision, the Board and the Hearing Officers, except for Member Jenkins, whose dissent constitutes the basis of this Petition (and whose language is substantially used herein) chose to ignore serious allegations and offers of proof that the local union, whose membership is predominantly black, practiced invidious racial discrimination against all Petitioner's white employees before and during the post-certification period.[4]

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[4]Petitioner has, because of its clarity and directness, herein utilized a substantial part of the dissenting opinion of Member Howard Jenkins, Jr., member of the three-man Board of the National Labor Relations Board sitting in this matter. Mr. Jenkins' opinion is shown in quotes, and those portions changed, altered or modified indicated by brackets.

"[Petitioner] has actively sought to litigate this constitutional issue before the Board on three separate occasions. On each occasion the Board has denied Petitioner's request for a 'day in court,' citing procedural grounds, thereby effectively precluding any consideration of the actual merits of [the] issue.

"Pursuant to the adoption of the Hearing Officer's recommendation in Case 12-RC-4447, the Board overruled [Petitioner's] objections to an October 26, 1973, election and issued a Certificate of [Representation]. Thereafter in response to the May 15, 1975, issuance of a complaint alleging its refusal to bargain in violation of Section 8(a)(5) of the Act, [Petitioner] filed an answer and amended answer and affirmative defenses contending, *inter alia*, that the Union should be barred from certification and access to the Board's remedial processes because it had engaged in acts of racial discrimination. See *NLRB v. Mansion House Center Management Corporation,* 473 F.2d 471 (C.A. 8, 1973). Subsquently, the General Counsel filed [Motions to Strike and] for Summary Judgment and the Board issued a Notice to Show Cause. [Petitioner filed a reply] in opposition to this motion [and amended answer, see footnote 3 *supra*] raising several factual issues, relating to the demand for recognition and asserting its *Mansion House* defense. The Board issued an order directing a hearing in the disputed factual issues, but held that [Petitioner] had not alleged sufficient facts to warrant a hearing on the *Mansion House* defense. [Petitioner] made its second attempt to litigate this issue when it came to the hearing prepared to present sufficient evidence to meet the Board's earlier objection to the inadequacy of its allegations. The

Administrative Law Judge refused to receive any such evidence, concluding that the order directing the hearing precluded litigation of this issue.[5] [Petitioner] made its third attempt to litigate this issue through the filing of timely exceptions to the Administrative Law Judge's Decision. On the basis of the Board's previously issued order remanding this proceeding for hearing, the majority affirmed the Administrative Law Judge's refusal to admit evidence in support of [Petitioner's] *Mansion House* defense, thereby effectively preventing [Petitioner] from ever having its 'day in court.'

"The effect of the Decision and Order in this case is to hold that the due process clause of the Fifth [and Fourteenth Amendments do] not preclude the Board from upholding the certification of, or extending remedial relief to, a union which engages in invidious discrimination on the basis of race.

. . .

"When evidence of invidious discrimination comes to [the Board's] attention, [it] is constitutionally mandated to insure that [they] do not become knowing and willing partners in its perpetuation. This obligation is most readily apparent in [this] case, where there are substantial allegations of the labor organizations general pattern and practice of discriminatory conduct as well as substantial allegations of *actual* discriminatory representation of unit employees during the postcertification period.

. . .

[5]The Administrative Law Judge did, however, permit a full offer of proof.

"In affirming the Administrative Law Judge's refusal to permit the introduction of evidence in support of Petitioner's *Mansion House* defense,[6] the [NLRB through its three-member board, with the exception of Member Jenkins, has] concluded that '[i]t is unnecessary in this Decision to reach the question of the propriety of exploring allegations of invidious discrimination at [that] stage of the Board's proceeding.' The law cannot subscribe to the notion that constitutional issues can be precluded from litigation at such a junction on the basis of procedural niceties for the purpose of avoiding their consideration. Cf. *Williams Enterprises, Inc.*, 212 NLRB 880 (1974). The majority stated that their review of [Petitioner's] offer of proof leads them to conclude that the alleged evidence 'was available and could have been discovered prior to the issuance of the Board's order of October 6.' [In the dissent of Member Jenkins, he states that he fails] to see how this fact could in any way cure possible constitutional infirmities arising out of government action sanctioning, assisting, and supporting discrimination.

"[The majority of the three-man panel seemed] to find some support for their position in *Handy Andy, supra.* Neither the majority opinion in *Handy Andy* nor in *Bell & Howell* supports their decision here. The concerns evidenced by the majority in those cases were that allegations of invidious discrimination raised as

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[6]Appeals courts have cited it with approval, *N.L.R.B. v. Union Nacional Trabajadores*, 540 F.2d 1 (C.A. 1, 1976); *Warner Press, Inc. v. N.L.R.B.*, 525 F.2d 190 (C.A. 7, 1975); *N.L.R.B. v. Bancroft Manufacturing Company, Inc.*, 516 F.2d 436 (C.A. 5, 1975).

objections to an election or as a defense to a technical 8(a)[(5)] charge to test an underlying certification were premature and speculative inasmuch as they would preclude the exclusive bargaining representative from 'proving itself' in its actual representative capacity following certification and bargaining. The present case is factually distinguishable. This case involves substantial allegations of [the Union's general pattern and practice of invidious discrimination as well as substantial allegations of actual discrimination in the representation of unit employees during the post-certification period. *In essence these allegations involved a presently litigable 'case or controversy' capable of resolution at [that] point in the proceedings.* (Emphasis supplied.) Moreover, any due process concerns [the majority] might have regarding the consideration of allegations of discrimination in representation proceedings do not have any application in [this case.] [T]he issue of discrimination in this case arises in an adversary proceeding before an Administrative Law Judge. Specific issues have been drawn to which the parties may address themselves. In addition, direct judicial review is available to any party who considers itself aggrieved by any final agency determination. Certainly [the Board has] no qualms about disqualifying a labor organization from becoming the exclusive bargaining representative of a particular unit of employees prior to an election because of a *potential* conflict of interest, on the basis of statutory policy.[7] In view of this, [the Board cannot justify ignoring a constitutional mandate against sanctioning

[7] *Harlem River Consumers Cooperative, Inc.* 191 NLRB 314 (1971); *Bambury Fashions, Inc.* 179 NLRB 447 (1969); *Welfare and Pension Funds,* 178 NLRB 14 (1969).

invidious discriminatory conduct, particularly in the context of an unfair labor practice proceeding with all its attendant procedural safeguards.

"The preference indicated by the majority in *Handy Andy* and *Bell & Howell* to resolve issues of unions' invidious discrimination in unfair labor practice proceedings under Section 8(b) of the Act is based on the untenable premise that the availability of a possible remedy at some future time can legitimize present unconstitutional sanction and support of discriminatory conduct. However, placing this very fundamental infirmity aside, [it is difficult to see what] substantive or procedural interest is advanced or preserved by taking cognizance of a charge of actual discrimination against the union in an 8(b) proceeding instead of under Section 8(a)(5) by which the employer, through a 'technical' violation of the Act, can test the issue at the outset. To the contrary, restricting litigation of claims of invidious discrimination by unions to unfair labor practice proceedings under Section 8(b) of the Act presents substantive and procedural drawbacks of significant proportion. Section 10(b) of the Act provides that 'no complaint shall issue based upon any unfair labor practice occurring six months prior to the filing of the charge with the Board . . . .' Thus, as a result of this 10(b) period, requiring deferral of consideration of allegations of invidious discrimination to a future proceeding under Section 8(b) of the Act may in a very real sense preclude their consideration in cases like [this] one. Moreover, barring the employer from raising such issues in an 8(a)(5) proceeding places an unfair burden on the victims of discrimination. Once an

employer has executed a collective-bargaining agreement pursuant to a bargaining order, it is unlikely that this employer will be sympathetic to challenging the status quo by vigorously pursuing a charge under Section 8(b) of the Act. In these circumstances the burden of initiating and following through an 8(b) charge falls squarely on the shoulders of the victims of discrimination. Faced with a hostile and discriminatory bargaining representative, the victims of discrimination may well be hesitant to step forward and file such a charge with the very governmental organization that has covered their bargaining representative's past practices with its protective cloak. Thus, the bargaining representative's discriminatory practices are permitted to continue unchecked. Alternatively, the few hardy souls who venture forth to file charges run a substantial risk of subjecting themselves to harassment and reprisal at the hands of the labor organization which has a vested interest in preserving the status quo."[8]

II

The issue here is one involving a federal question of great importance, i.e., shall the National Labor Relations Board and the Courts be advocates of discrimination in employment when such is against the national policy.

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[8]Cf. *United Packinghouse Workers v. N.L.R.B.*, 416 F.2d 1126 (C.A. D.C., 1969), wherein the court noted that: "Racial discrimination sets up a clash of interests between groups of workers which tends to reduce the likelihood and the effectiveness of their working in concert to achieve their legitimate goals under the Act . . . ."

Certiorari should be granted to resolve a federal question of serious consequence to the general public. Industrial and labor harmony and tranquility are matters of the utmost importance and concern to the nation as a whole, and to its citizens, and thusly affect the national community.

As indicated in the dissenting opinions of Member Jenkins in *Handy Andy,* supra, and *Bell & Howell Company,* supra, certification of a union as exclusive bargaining representative grants it a significant degree of control over the destiny of the employees it seeks to represent[9] and vests it with *public rather than private rights.* Accordingly, upholding the certification of an exclusive bargaining representative engaged in invidious discrimination and protecting this status by extending remedial relief in the form of a bargaining order constitutes government action sanctioning, assisting, and supporting discrimination in violation of the Constitution.

Invidious racial discrimination engaged in by the Union, as in this instance, if not found to invalidate the statutory representative status of the Union, would seriously damage, and possibly destroy, the Section 7 rights of the affected employees; this failure to so find in effect, would validate the illegal conduct of the union; therefore, this is "an important federal question" which Petitioner urges this Court to address in this matter.

"The national policy against discrimination in employment is poorly served by [the majority board

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[9]*Emporium Capwell Co. v. Western Addition Community Organization,* 420 U.S. 50 (1975).

decision and by the affirming opinion of the Court of Appeals for the Fifth Circuit] decision. Moreover, [the] decision represents a clear abrogation of [the] constitutional duty [of the Board and the Court] to refrain from sanctioning, assisting, and supporting invidious discrimination. Indeed, this decision marks a step backward for all those who would seek the good offices of [the NLRB] in freeing themselves of the burden of discrimination whether it be on the basis of race, creed, color, sex, religion, or national origin."

The substance of the foregoing Petition for Certiorari is extracted in great part from the Dissenting Opinion of Member Jenkins, because it states Petitioner's position with authority, vigor and clarity. Petitioner has been unable to improve on the statements and theories advanced by Board Member Jenkins, and accordingly relies upon that dissent.

CONCLUSION

WHEREFORE Petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

Alan A. Bruckner, P.A.
25 Southeast Second Avenue
Suite 1016
Miami, Florida 33131

By:_____
Alan A. Bruckner
Attorney for Petitioner

CERTIFICATE OF SERVICE

It is hereby certified that three copies of the Petition for Writ of Certiorari were caused to be served via United States Mail this____day of April, 1980, upon the following:

National Labor Relations Board
1717 Pennsylvania Avenue N.W.
Washington, D.C. 20507

_____
Alan A. Bruckner

APPENDIX A

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

HEAVY LIFT SERVICES, INC.

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1680, AFL-CIO

DECISION AND ORDER

On January 16, 1976, Administrative Law Judge Thomas D. Johnston issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

In view of the procedural history of this case, our colleague's dissenting opinion herein mystifies us. He has, without explanation, reversed his position with regard to the necessity of a hearing for the admission of evidence relevant to Respondent's affirmative defense that the Union is not entitled to certification and

recognition because it has engaged in racially discriminatory conduct. He has also apparently ignored the fact that the legal view which he presently advocates was the view of a Board majority in *Bekins Moving & Storage Co. of Florida, Inc.*, 211 NLRB 138 (1974), which, although subsequently overruled represented controlling Board law when he participated on a Board panel which considered the merits of Respondent's affirmative defense. On October 6, 1975, the panel issued an unpublished order in this case which unanimously found that the defense allegation failed to raise factual issues warranting a hearing. Under these circumstances, we cannot understand Member Jenkins' vigorous protestation that Respondent has been denied its "day in court" on the issue of the Union's alleged discriminatory practices.

The complaint in this proceeding issued on May 15, 1975.[1] Respondent's initial answer, filed on May 29, made no reference to alleged discriminatory practices by the Union. The General Counsel then filed, on June 3, a document entitled "Motion to Strike Portions of Respondent's Answer and Motion for Summary Judgment," with supporting evidentiary exhibits attached. The Regional Director for Region 12 referred these motions to the Board for a ruling.

On July 8, Respondent filed its reply in opposition to the General Counsel's motions and an amended answer which for the first time affirmatively alleged, *inter alia*, "that the Union does now, and has in the past, during material times hereto, engaged in unlawful, illegal, and discriminatory racial practices as to

[1]All dates refer to 1975, unless otherwise indicated.

employee and membership practices as to disqualify it from being certified as a labor organization within the meaning of Section 2(5) of the Act and to preclude it from remedial relief from a governmental agency."[2] No affidavits or exhibits were filed in support of this allegation. On July 15, the General Counsel filed a response to the Respondent's reply.

Chairman (then Member) Fanning and Members Jenkins and Penello comprised the Board panel which considered the issues presented in the 8(a)(5) summary judgment action and issued an order, subscribed by the Executive Secretary, on October 6. The order stated generally that the Board "is of the opinion that Respondent's denials of the Union's request to bargain and its refusal of such request raise disputed factual issues which could best be resolved by a hearing." The language of the order continued as follows:

> However, Respondent's request for a hearing on its affirmative defense that the Union is not entitled to certification because it has engaged

[2]Although Respondent refers in its amended answer to past practices, it never raised the issue of racial discrimination by the Union during the representation proceedings in Case 12 — RC — 4447 which resulted in the Union's certification and preceded the refusal to bargain at issue herein. Respondent did file postelection objections in the underlying representation proceeding which alleged, *inter alia,* that preelection appeals to racial prejudice required setting aside the election on the basis of principles enunciated in *Sewell Manufacturing Company,* 138 NLRB 66 (1962). The Board overruled this and all other objections.

> in discriminatory conduct is denied.[2] Mere unsupported allegations of the Union's having engaged in such conduct, without more, are insufficient to raise factual issues warranting a hearing. . . .[3]

The Order concluded by remanding this case to the Regional Director for a hearing "on the issues framed by the parties' pleadings, *as limited above*. . . ." (Emphasis supplied.) Respondent did not file a motion for reconsideration of the order.

Both at the subsequent hearing and in his Decision, the Administrative Law Judge interpreted the language quoted above as the law of the case and a bar to further litigation by Respondent of its affirmative defense alleging discrimination by the Union. In accord with his interpretation, he refused to admit evidence relevant to that defense. He did, however, permit Respondent to make a full offer of proof for the record. There is no longer any dispute with respect to issues actually litigated at the hearing.

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[2]In view of the conclusion that Respondent has presented insufficient factual bases for a hearing on the alleged discriminatory conduct, the Panel (Members Fanning, Jenkins and Penello) do not reach the question of the propriety of exploring such issue at this juncture of the proceedings. Cf. *Bekins Moving & Storage Co.*, 211 NLRB 138.

[3]We note that Respondent raised the issue of racial animosity as precluding a fair election in its objections to the election in the underlying representation case. Therein, following a hearing, the Board adopted the Hearing Officer's recommendations that such objections be overruled and the Union certified.

In its exceptions to the Administrative Law Judge's Decision, Respondent challenges his exclusionary ruling, reiterates the defense that the Union is not entitled to certification or to resort to the Board's remedial processes because of its unlawful discriminatory policies and practices, and, in support of its defense, recites the putative evidence contained in Respondent's rejected exhibits and offer of proof. We find no merit in these exceptions.

The requirement of minimal proof that a factual issue actually exists is a procedural necessity, rather than a procedural nicety, and one which our dissenting colleague has heretofore recognized. A motion for summary judgment is one of several traditional means by which adverse parties may be put to the test of their allegations prior to a full evidentiary hearing. Although the General Counsel bears the burden of proving all elements of an unfair labor practice violation in Board proceedings, the initial burden of proceeding with proof of an affirmative defense rests with Respondent.

The General Counsel's Motion for Summary Judgment on the complaint in this case was supported by relevant exhibits. Respondent's reply in opposition and amended answer successfully controverted certain elements of the complaint, thereby establishing the existence of factual issues necessitating a hearing. Respondent did not, however, offer any evidence to the Board in support of the affirmative defense, raised for the first time in its amended answer, that the Union has engaged in illegal racial discrimination.

We had supposed that Member Jenkins' participation in the Board's order ruling on the summary judgment motion indicated his full agreement with the unambiguous meaning of the order that because Respondent failed to support its affirmative defense allegation when procedurally compelled to do so, there was no factual issue thereafter to be litigated with respect to this defense. We see no basis on which Respondent could have misunderstood the clear import of the specific statement, in an order against which Respondent did not move for reconsideration, that its request for a hearing on the affirmative defense at issue "is denied." Under these circumstances, this lengthy Decision and an inordinately protracted delay in the onset of collective bargaining between Respondent and the Union were totally unwarranted and unnecessary.

The rejected exhibits and offer of proof on which Respondent and Member Jenkins place such great reliance do indeed pertain to alleged postelection and postcertification discriminatory conduct by the Union. In this regard, we note that a period of over 12 months transpired between the Union's election victory in Case 12 — RC — 4447 and its certification by the Board. An additional half year passed prior to the issuance of the complaint in this proceeding. Still more than another month intervened before Respondent filed its amended answer which initially raised the unsupported affirmative defense allegations of discriminatory conduct. Nearly 3 months later, the Board's October 6 order unambiguously denied a hearing on that defense for want of a minimal evidentiary showing. Respondent, however, persisted in attempts to raise the defense at the subsequent hearing.

Respondent has never contended, nor does our own independent review of its offer of proof reveal, that the evidence rejected by the Administrative Law Judge at the hearing was discovered after or was unavailable prior to the Board's October 6 order which specifically rejected the affirmative defense raised and litigated by Respondent in that summary judgment phase of this unfair labor practice proceeding. Under the circumstances, we must conclude that the alleged evidence of postelection and postcertification conduct was available and could have been discovered prior to the issuance of the Board's order of October 6. We regret that this well-founded conclusion and its chronological context have escaped our dissenting colleague. We shall nonetheless affirm the Administrative Law Judge's exclusionary ruling. We shall likewise affirm his ultimate conclusion that Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

It is unnecessary in this Decision to reach the question of the propriety of exploring allegations of invidious union discrimination at this stage of the Board's proceedings. In response to the view expressed in the dissent on this issue, we emphasize our adherence to the majority position in *Handy Andy, Inc.*,[3] wherein we overruled the *Bekins* decision, and in *Bell & Howell Company.*[4] For reasons fully explained in those cases, we have concluded that the Board is not under a constitutional mandate to consider allegations about a union's discriminatory practices in either a representation proceeding or when raised by a

[3]228 NLRB No. 59 (1977).

[4]230 NLRB No. 57 (1977).

Respondent as an affirmative defense to a complaint charging it with violating the Act by refusing to bargain with the collective-bargaining representative of its employees. While Member Jenkins decries the denial of due process attributed to our Decision herein, we note, in addition to the circumstances previously discussed, that throughout the entire 2½-year history of this case the Respondent or any one of the alleged employee discriminatees has had and continues to have the right to litigate the issue of the Union's invidious discrimination by the preferable, direct, and expeditious means of an 8(b) unfair labor practice proceeding.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Heavy Lift Services, Inc., Riviera Beach, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. February 27, 1978

John H. Fanning, Chairman

John A. Penello, Member

Betty Southard Murphy, Member

NATIONAL LABOR RELATIONS BOARD

MEMBER JENKINS, dissenting:

My colleagues have found that Respondent has violated Section 8(a)(5) of the Act and they have ordered the Respondent to bargain collectively with the Union in the unit found appropriate. Unfortunately, in arriving at this conclusion, my colleagues have chosen to ignore serious and substantial allegations that this Local Union, whose membership is predominantly black, practiced racial discrimination against Respondent's white employees during the postcertification period. In my judgment, such an approach is completely at odds with the requirements of the due process clause of the fifth amendment to the Constitution.

Respondent has actively sought to litigate this constitutional issue before the Board on three separate occasions. On each occasion the Board has denied Respondent's request for a "day in court," citing procedural grounds, thereby effectively precluding any consideration of the actual merits of this issue.

Pursuant to the adoption of the Hearing Officer's recommendations in Case 12 — RC — 4447, the Board overruled Respondent's objections to an October 26, 1973, election and issued a Certification of Representative. Thereafter in response to the May 15, 1975, issuance of a complaint alleging its refusal to bargain in violation of Section 8(a)(5) of the Act, Respondent filed an answer and amended answer contending that the Union should be barred from certification and access to the Board's remedial processes because it had engaged in acts of racial discrimination. See *N.L.R.B. v. Mansion House Center*

Management Corporation, 473 F.2d 471 (C.A. 8, 1973). Subsequently, the General Counsel filed a Motion for Summary Judgment and the Board issued a Notice To Show Cause. Respondent replied in opposition to this motion by raising several factual issues relating to the demand for recognition and by renewing its *Mansion House* defense. The Board issued an order directing a hearing in the disputed factual issues but held that Respondent had not alleged sufficient facts to warrant a hearing on the *Mansion House* defense.[5] Respondent made its second attempt to litigate this issue when it came to the hearing prepared to present sufficient evidence to meet the Board's earlier objection to the inadequacy of its allegations. The Administrative Law Judge refused to receive any such evidence, concluding that the order directing the hearing precluded litigation of this issue.[6] Respondent made its third and final attempt to litigate this issue through the filing of timely exceptions to the Administrative Law Judge's Decision. On the basis of the Board's previously issued order remanding this proceeding for hearing, my colleagues in the majority now affirm the Administrative Law Judge's refusal to admit evidence in support of Respondent's

[5]My colleagues correctly point out that I participated in the issuance of the order directing a hearing on the disputed factual issues but denying a hearing on the *Mansion House* defense. My colleagues incorrectly state that the Board panel issuing this order considered the merits of Respondent's affirmative defense. The order merely held that "unsupported allegations . . . without more, are insufficient to raise factual issues warranting a hearing." I do not now, and never have, viewed such a ruling on procedural grounds to foreclose in perpetuity the litigation of a constitutional issue going to the very heart of national labor policy.

[6]The Administrative Law Judge did however, permit a full offer of proof.

Mansion House defense, thereby effectively preventing Respondent from ever having its "day in court."

The effect of the Decision and Order in this case is to hold that the due process clause of the fifth amendment does not preclude the Board from upholding the certification of, or extending remedial relief to, a union which engages in invidious discrimination on the basis of race. As I indicated in my dissenting opinions in *Handy Andy,* 228 NLRB No. 59 (1977), and *Bell & Howell Company,* 230 NLRB No. 57 (1977), certification of a union as exclusive bargaining representative grants it a significant degree of control over the destiny of the employees it seeks to represent[7] and vests it with public rather than private rights. Accordingly, upholding the certification of an exclusive bargaining representative engaged in invidious discrimination and protecting this status by extending remedial relief in the form of a bargaining order constitutes government action sanctioning, assisting, and supporting discrimination in violation of the Constitution.

When evidence of invidious discrimination comes to our attention, we are constitutionally mandated to insure that we do not become knowing and willing partners in its perpetuation. This obligation is most readily apparent in a case such as the present one where there are substantial allegations of the labor organization's general pattern and practice of discriminatory conduct as well as substantial allegations of *actual* discriminatory representation of

[7] *Emporium Capwell Co. v. Western Addition Community Organization,* 420 U.S. 50 (1975).

unit employees during the postcertification period. For these reasons and the additional reasons set forth below, I disagree most strongly with my colleagues' decision to uphold Petitioner's certification and to issue a bargaining order without first considering the claim that it engages in racial discrimination in its representation of Respondent's employees.

In affirming the Administrative Law Judge's refusal to permit the introduction of evidence in support of Respondent's *Mansion House* defense,[8] my colleagues have concluded that "[i]t is unnecessary in this Decision to reach the question of the propriety of exploring allegations of invidious discrimination at this stage of the Board's proceeding." I cannot subscribe to the notion that constitutional issues can be precluded from litigation at this junction on the basis of procedural niceties for the purpose of avoiding their consideration. Cf. *Williams Enterprises, Inc.*, 212 NLRB 880 (1974). I note particularly my colleagues' statement that their review of Respondent's offer of proof leads them to conclude that the alleged evidence "was available and could have been discovered prior to the issuance of the Board's order of October 6." I fail to see how this fact could in any way cure possible constitutional infirmities arising out of government action sanctioning, assisting, and supporting discrimination.

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[8]I note with great concern that the majority in *Bell & Howell Company, supra,* rather summarily indicated that it would decline to continue to adhere to *Mansion House, supra,* in spite of the fact that three other United States Courts of Appeals have cited it with approval. *N.L.R.B. v. Union Nacional de Trabajadores,* 540 F.2d 1 (C.A. 1, 1976); *Warner Pres, Inc. v. N.L.R.B.*, 525 F.2d 190 (C.A. 7, 1975); *N.L.R.B. v. Bancroft Manufacturing Company, Inc.*, 516 F.2d 436 (C.A. 5, 1975).

The majority seem to find some support for their position in *Handy Andy, supra.* Neither the majority opinion in *Handy Andy* nor in *Bell & Howell,* in both of which I dissented, supports their decision here. The concerns evidenced by the majority in those cases were that allegations of invidious discrimination raised as objections to an election or as a defense to a technical 8(a)(5) charge to test an underlying certification were premature and speculative inasmuch as they would preclude the exclusive bargaining representative from "proving itself" in its actual representative capacity following certification and bargaining. The present case is factually distinguishable. This case involves substantial allegations of Petitioner's general pattern and practice of invidious discrimination as well as substantial allegations of actual discrimination in the representation of unit employees during the postcertification period. In essence these allegations involve a presently litigable "case or controversy" capable of resolution at this point in the proceedings. Moreover, any due process concerns my colleagues might have regarding the consideration of allegations of discrimination in representation proceedings do not have any application in the case before us. After all, the issue of discrimination in this case arises in an adversary proceeding before an Administrative Law Judge. Specific issues have been drawn to which the parties may address themselves. In addition, direct judicial review is available to any party who considers itself aggrieved by any final agency determination. Certainly we have no qualms about disqualifying a labor organization from becoming the exclusive bargaining representative of a particular unit of employees prior to an election because of a *potential* conflict of interest, on

the basis of statutory policy.[9] In view of this fact I do not see how we can justify ignoring a constitutional mandate against sanctioning invidious discrimination when faced with substantial allegations of *actual* discriminatory conduct, particularly in the context of an unfair labor practice proceeding with all its attendant procedural safeguards.

The preference indicated by the majority in *Handy Andy* and *Bell & Howell* to resolve issues of unions' invidious discrimination in unfair labor practice proceedings under Section 8(b) of the Act is based on the untenable premise that the availability of a possible remedy at some future time can legitimize present unconstitutional sanction and support of discriminatory conduct. However, placing this very fundamental infirmity aside, I fail to see what substantive or procedural interest is advanced or preserved by taking cognizance of a charge of actual discrimination against the union in an 8(b) proceeding instead of under Section 8(a)(5) by which the employer, through a "technical" violation of the Act, can test the issue at the outset. To the contrary, restricting litigation of claims of invidious discrimination by unions to unfair labor practice proceedings under Section 8(b) of the Act presents substantive and procedural drawbacks of significant proportion. Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring six months prior to the filing of the charge with the Board . . . ." Thus, as a result of this 10(b) period, requiring deferral of consideration of allegations of invidious discrimination to a future

[9] *Harlem River Consumers Cooperative, Inc.*, 191 NLRB 314 (1971); *Bambury Fashions, Inc.*, 179 NLRB 447 (1969); *Welfare and Pension Funds*, 178 NLRB 14 (1969).

proceeding under Section 8(b) of the Act may in a very real sense preclude their consideration in cases like the present one. Moreover, barring the employer from raising such issues in an 8(a)(5) proceeding places an unfair burden on the victims of discrimination. Once an employer has executed a collective-bargaining agreement pursuant to a bargaining order, it is unlikely that this employer will be sympathetic to challenging the status quo by vigorously pursuing a charge under Section 8(b) of the Act. In these circumstances the burden of initiating and following through an 8(b) charge falls squarely on the shoulders of the victims of discrimination. Faced with a hostile and discriminatory bargaining representative, the victims of discrimination may well be hesitant to step forward and file such a charge with the very governmental organization that has covered their bargaining representative's past practices with its protective cloak. Thus, the bargaining representative's discriminatory practices are permitted to continue unchecked. Alternatively, the few hardy souls who venture forth to file charges run a substantial risk of subjecting themselves to harassment and reprisal at the hands of the labor organization which has a vested interest in preserving the status quo.[10]

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[10]Cf. *United Packinghouse Workers v. N.L.R.B.*, 416 F.2d 1126 (C.A.D.C., 1969), wherein the court noted, that:

> racial discrimination sets up a clash of interests between groups of workers which tends to reduce the likelihood and the effectiveness of their working in concert to achieve their legitimate goals under the Act . . . .

Id. at 1135.

The national policy against discrimination in employment[11] is poorly served by this decision of my colleagues. Moreover, this decision represents a clear abrogation of our constitutional duty to refrain from sanctioning, assisting, and supporting invidious discrimination. Indeed, this decision marks a step backward for all those who would seek the good offices of our Agency in freeing themselves of the burden of discrimination whether it be on the basis of race, creed, color, sex, religion, or national origin.

Dated, Washington, D.C. February 27, 1978.

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

[11]*Emporium Capwell Co. v. Western Addition Community Organization*, fn. 2, *supra*; *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Wallace Corporation v. N.L.R.B.*, 323 U.S. 248 (1944); *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944); *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938).

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES

HEAVY LIFT SERVICES, INC.

and

INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION
LOCAL 1680, AFL-CIO

Case 12-CA-6740

Delores M. Peer, Esq., and *Nestor Cruz, Esq.*, for the General Counsel.

Alan A. Bruckner, Esq., and *Averill G. Marcus, Esq. (Bruckner, Greene, & Manas, P.A.)*, of Miami, FL, for the Respondent.

Allan M. Elster, Esq. (Mamber, Gopman, Epstein & Foosaner), of North Miami Beach, FL, for the Charging Party.

DECISION

Statement of the Case

THOMAS D. JOHNSTON, Administrative Law Judge: This case was heard at West Palm Beach, Florida, on December 9, 1975,[1] pursuant to a charge

[1]All the dates referred to are in 1975 unless otherwise stated.

filed on April 15 by the International Longshoremen's Association, Local 1680, AFL-CIO (herein referred to as the Union), and a complaint issued on May 15.

The complaint alleged that Heavy Lift Services, Inc. (herein referred to as the Respondent), violated Section 8(a) (5) and (1) of the National Labor Relations Act, as amended (herein referred to as the Act), by refusing to bargain collectively with the Union as the certified bargaining representative of certain employees employed by the Respondent at the Port of Palm Beach, Riviera Beach, Florida.

Respondent in its amended answer filed on July 10 denied having violated the Act and also denied the Union was a labor organization, that the Union was the exclusive representative of its employees in the appropriate unit or that the Union had made certain demands to bargain or that such demands had been refused. Asserted as affirmative defenses in its amended answer were as follows: the Union had engaged in unlawful, illegal and discriminatory racial practices to disqualify it from being certified as a labor organization under the Act and barring it from remedial relief; the Respondent's objections and supplemental objections to Conduct Affecting Results Of The Election and its exceptions to the Regional Director's Report And Recommendations and the Report And Recommendation Of The Hearing Officer were erroneously denied; the Board erroneously issued its Supplemental Decision And Certification Of Representative certifying the Union; the Board erroneously, and in abuse and excess of its authority, designated the Hearing Officer, who was not qualified by the Administrative Procedure Act or otherwise, to

conduct the hearing to determine disputed questions of fact and he failed to conduct such hearing in accordance with the rules of evidence and law applicable to a hearing under the Act; the Hearing Officer's findings of fact and conclusions of law were erroneous; and as a result of all the foregoing the Respondent was denied due process of law. Further affirmative defenses asserted were the Respondent had not unlawfully refused to bargain; it was not lawfully under a duty to bargain; the Union's bargaining demands were not made in good faith, were specious and part of a historical pattern and practice of specious demands followed by en abandonment of any representative status of any bargaining rights; and that unusual circumstances existed which nullified any obligation on Respondent's part to bargain.

The issue involved is whether the Respondent violated Section 8(a) (5) and (1) of the Act by refusing to bargain with the Union as the exclusive bargaining representative of certain employees.

The parties at the hearing were afforded full opportunity to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally on the record, and to submit briefs.[2]

Upon the entire record in this case,[3] and from my observation of the witnesses, and after due consideration

[2]Respondent's unopposed motion dated January 5, 1976 to include as Respondent's Exhibit 8 its appeal from the Regional Director's denial of requests for records under the Freedom of Information Act is hereby granted.

[3]The Respondent's unopposed motion to correct the transcript is hereby granted.

of the briefs filed by the General Counsel and the Respondent[4] I hereby make the following:

Findings of Fact

I. The Business of the Respondent

Respondent, a Florida corporation, has an office and place of business located at the Port of Palm Beach, Riviera Beach, Florida, where it is engaged in the business of providing stevedoring services to customers engaged in interstate commerce and is an essential link in the transportation of cargo or commodities in interstate commerce.

During the 12-month period preceding May 15, a representative period, Respondent in the course of its operations herein described provided services valued in excess of $50,000 to customers which met one of the Board's jurisdictional standards other than indirect outflow or indirect inflow.

Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The complaint alleges and Respondent denies that the International Longshoremen's Association, Local 1680, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

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[4]The Charging Party did not submit a brief.

The Respondent in the underlying representation proceeding, Case 12-RC-4447 having entered into a Stipulation For Certification Upon Consent Election and the Board in its Supplemental Decision and Certification of Representative issued in that case having found the Union to be a labor organization and certified it as the exclusive bargaining representative of Respondent's employees in the appropriate unit, I find that Respondent by its denial is attempting to relitigate issues previously determined in representation Case 12-RC-4447.[5]

The law is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances, more of which are present here, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[6]

Therefore I find, contrary to Respondent's denial, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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[5]I have taken official notice of certain records in the representation proceeding, Case 12-RC-4447 as requested by the General Counsel and the Respondent.

[6]See *P & B Packers, Inc.*, 195 NLRB 318; *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162; Rules and Regulations of the Board, Series 8, as amended, Secs. 102.67(f) and 102.69(c).

III. The Unfair Labor Practices

A. The Union's Certification as Bargaining Representative

The records contained in the underlying representation proceeding, Case 12-RC-4447 and the pleadings established that pursuant to a Stipulation For Certification Upon Consent Election executed by the Respondent and the Union and approved by the Acting Regional Director of Region 12 on September 17, 1973, an election by secret ballot was conducted on October 26, 1973, under the direction and supervision of the Regional Director, among Respondent's employees in the following stipulated unit:

> All regular full-time employees (meaning all employees who are hired to work 40 hours a week, 52 weeks a year and receive a weekly paycheck), including longshoremen, warehousemen, equipment operators, truckdrivers, checkers and headers employed by the Employer at the Port of Palm Beach, Riviera Beach, Florida: excluding all office clerical employees, part-time and casual employees, guards and supervisors as defined in the Act.

The results of the election as disclosed by a tally of ballots furnished to the parties showed that out of approximately 24 eligible voters, 21 cast ballots of which 11 were for the Union, 10 were against the Union, and 1 challenged ballot which was sufficient in number to affect the results of the election.

On November 2, 1973, the Respondent filed timely objections to conduct affecting the results of the election and on November 15, 1973, it filed supplemental objections.

Following an investigation the Regional Director on December 14, 1973, issued his Report On Challenged Ballot And Objections recommending that the Board sustain the challenge to the aforesaid challenged ballot, overrule the objections in their entirety, deny the Respondent's request for a hearing, and that the Union be certified as the bargaining representative of the employees in the appropriate unit. After timely exceptions were filed by the Respondent to the Regional Director's Report On Challenged Ballot And Objections the Board on April 9, 1974, issued its Decision And Order Directing Hearing with respect to certain of the objections raised by the Respondent. On May 15 and 16, 1974, a hearing was conducted by a duly designated Hearing Officer, Robert C. Batson, at which all parties appeared and participated and on August 30, 1974, the Hearing Officer issued his Report And Recommendation On Objections wherein he recommended that the Board overrule the objections in their entirety and issue a Certification of Representative to the Union. Thereafter the Respondent filed timely exceptions to the Hearing Officer's report and on December 19, 1974, the Board issued its Supplemental Decision And Certification Of Representative wherein it adopted the Hearing Officer's findings, conclusions and recommendations and certified the Union, which had received the majority of the valid votes cast, as the exclusive bargaining representative of the employees in the above-described unit which the Board found constituted a unit

appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.[7]

B. The Union's Demand for Bargaining and Respondent's Refusal

Earl Gipson, who is the President and Business Agent of the Union, testified on January 2, he sent the following letter, dated December 31, 1974, to Robert Dias, who is the President of the Respondent:[8]

> You are aware, of course, of the final decision made by the National Labor Relations Board in Washington, D.C. on December 19th 1974; which certified International Longshoremen's Association Local 1680 AFL-CIO as the exclusive bargaining representative for all the employees in the appropriate unit.
>
> Therefore, we are requesting to have a meeting with you on a date, time and place of your choice for the purpose of collective bargaining on behalf of all employees in the appropriate unit, with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

---

[7]The Respondent in its answer admits the unit was appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

[8]Respondent in its answer admits, and I find, that at all times material herein, Robert Dias held the position of President of the Respondent and was its supervisor and agent within the meaning of the Act.

According to President Gipson, after the letter was typed by a secretary, he read it, signed it, put it in an envelope, sealed it, and took it to the post office himself and mailed it. This letter was sent to President Dias by certified mail, with a return receipt requested. A copy of the letter was also sent in the same manner to the law firm of Bruckner & Greene.[9] Receipts for certified mail show the letters were correctly addressed to both the Respondent and the law firm and return receipts, which Gipson testified he subsequently received in the mail, show that the letter to the Respondent was received on January 3, and the letter to the law firm was received on January 6.

I credit President Gipson's undisputed testimony which was corroborated by the receipts for certified mail and returned receipts and find that Gipson on January 2 sent President Dias a letter with a copy to the law firm representing the Respondent requesting that the Respondent meet with the Union for the purpose of collective bargaining with respects to the rates of pay, wages, hours of employment and other terms and conditions of employment concerning those employees it had been certified by the Board to represent.

Having found these letters were sent by certified mail, were properly addressed, and the return receipts showed that they were received, and absence any evidence of the contrary, I find that such letters were received by the Respondent on January 3 and the law firm representing it on January 6.

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[9]The record reflected this law firm represented the Respondent in Case 12-RC-4447.

President Gipson further testified without contradiction, and I credit his testimony, that he never received a reply to those letters and that neither the Respondent nor President Dias ever bargained with him over a contract. Although under cross-examination Gipson acknowledged he did not follow up on the letter by calling President Dias his explanation was since he had gotten the return receipt he knew Dias had received his letter.

Allan Elster, who is the Union's attorney,[10] testified after receiving a copy of President Gipson's December 31 letter to President Dias and having a conversation with Gipson he prepared a letter dated March 26, addressed to President Dias which reiterated President Gipson's earlier request for bargaining and gave Respondent 5 days in which to respond or unfair labor practice charges would be filed.

However, since Elster did not personally mail the letter and the secretaries who normally handled the mail were not called to testify and Elster admitted under cross-examination he did not know what mailing procedures were followed that particular day I do not find the evidence sufficient to establish this letter was in fact mailed.[11]

Attorney Elster further testified sometime between March 26, and April 15 when the charge was filed he

[10]Attorney Elster also represented the Union in Case 12-RC-4447.

[11]Attorney Elster acknowledged he never did receive a reply to this letter.

contacted Attorney Bruckner[12] by telephone and after mentioning he had sent a letter to Bruckner's client Heavy Lift, about bargaining with them he told Bruckner before he filed any charge he wanted to find out whether there was some mix up or if Bruckner had been busy and neglected to respond or whether he intended to take that on. Bruckner's response was for him to do what he thought was best and upon asking Bruckner whether he had to file a charge Bruckner again told him to do what he thought was best.

Attorney Bruckner did not testify and I credit Attorney Elster's testimony.

C. Respondent's Defenses

The Respondent in its amended answer raised numerous affirmative defense enumerated, *supra.* Included among such defenses was the contention that the Union had engaged in discriminatory racial practices to disqualify it from being certified as a labor organization under the Act and barring it from remedial relief.

On October 6, the Board issued its Order ruling upon a motion for summary judgment, urged by the General Counsel and opposed by the Respondent, in which this affirmative defense was raised and discussed and the Board denied Respondent's request for a

[12]Attorney Elster testified he knew Attorney Bruckner personally and recognized his voice.

hearing on this defense.[13] Accordingly, the Respondent was precluded from litigating that defense at the hearing.

With respect to the remaining affirmative defenses, and the Respondent's denial in its amended answer that the Union was the exclusive representative of its employees in the appropriate unit, apart from requesting that official notice be taken of the proceedings in Case 12-RC-4447, no other evidence was proffered by the Respondent in support of such alleged defenses. This same evidence was previously considered by the Board in the underlying representation proceeding and these defenses relating to that proceeding, to the extent they have not already been decided by the Board, involved issues which were or could have been litigated in that proceeding. Absence as here any newly discovered or previously unavailable evidence or special circumstances entitling Respondent to relitigate such issues its asserted defenses relating to the representation proceeding are hereby rejected. Further those asserted affirmative defenses which do not

[13]The Board in denying Respondent a hearing on this defense cited *Bekins Moving & Storage Co.*, 211 NLRB No. 7, which holds that in considering whether a certification should issue to a union whose capacity to fairly represent unit employees is challenged it will consider the merits of such an objection prior to issuance of a Board certification, but only after the election has been held and only then if the union involved has won the election. The Board further noted that the Respondent has presented an unsufficient factual basis for a hearing and that its objection relating to the issue of racial animosity by the Union in the underlying representation proceeding had already been overruled following a hearing.

involve the representation proceedings are also rejected since no evidence was adduced to support them.[14]

Analysis and Conclusions

The General Counsel contends contrary to the Respondent's denial that the Respondent violated Section 8(a)(5) and (1) of the Act[15] by refusing to bargain collectively with the Union as the bargaining representative of the employees in the certified unit.

The findings *supra*, established that commencing on or about January 3, 1975, the Union by letter requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the bargaining unit herein described which it had been certified by the Board to represent and notwithstanding receipt of such request the Respondent since on or about January 3, 1975, has refused and continues to refuse to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in the unit.

Having rejected the Respondent's defenses for those reasons previously stated I find that the Respondent

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[14]Respondent's only offers of proof, which were rejected, dealt solely with its affirmative defense that it was precluded from litigating.

[15]Section 8(a)(1) of the Act prohibits an employer from interfering with, restraining or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act while Section 8(a)(5) of the Act prohibits an employer from refusing "to bargain collectively with the representatives of his employees" designated by a majority of those in an appropriate unit.

since January 3, 1975, and at all times thereafter has refused to bargain collectively with the Union as the exclusive representative of the employees in the unit which they were certified by the Board to represent and that the Respondent by its refusal has thereby violated Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices affecting commerce occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate and substantial relationship to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

Conclusions of Law

1. Heavy Lift Services, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Longshoremen's Association, Local 1680, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All regular full-time employees (meaning all employees who are hired to work 40 hours a week, 52 weeks a year and receive a weekiy paycheck), including

longshoremen, warehousemen, equipment operators, truckdrivers, checkers, and headers employed by the Employer at the Port of Palm Beach, Riviera Beach, Florida: excluding all office clerical employees, part-time and casual employees, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since December 19, 1974, the Union has been and is now the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about January 3, 1975, and at all times thereafter, to bargain collectively with the Union as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, the Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby is engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I shall recommend that the Respondent cease and desist therefrom and to take certain affirmative action to effectuate the policies of the Act. Accordingly, it is recommended that Respondent, upon request, bargain collectively with the Union as the exclusive representative of all the employees in the aforesaid appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining representative for the period provided by law, the initial period of certification shall be construed as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229, enf'd 328 F.2d 600 (C.A. 5) cert. denied 379 U.S. 817.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[16]

[16]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relatior Board, the findings, conclusions, and recommended Order herein, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Heavy Lift Services, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours and other terms and conditions of employment with International Longshoremen's Association, Local 1680, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All regular full-time employees (meaning all employees who are hired to work 40 hours a week, 52 weeks a year and receive a weekly paycheck), including longshoremen, warehousemen, equipment operators, truckdrivers, checkers, and headers employed by the Employer at the Port of Palm Beach, Riviera Beach, Florida: excluding all office clerical employees, part-time and casual employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, bargain with International Longshoremen's Association, Local 1680, AFL-CIO, as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Riviera Beach, Florida, facility, copies of the attached notice marked "Appendix."[17] Copies of said notice, on forms furnished by the Regional Director for Region 12 shall after being duly signed by Respondent's representative be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order what steps have been taken to comply herewith.

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[17]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

IT IS FURTHER ORDERED that the complaint be and hereby is dismissed insofar as it alleges unfair labor practices not specifically found herein.

Dated, Washington, D.C.

/s/ Thomas D. Johnston
Thomas D. Johnston
Administrative Law Judge

APPENDIX B

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours and other terms and conditions of employment with INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1680, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below with respect to rates of pay, wages, hours and other terms and conditions of employment, and, if an understanding is reached embody such understanding in a signed agreement. The bargaining unit is:

> All regular full-time employees (meaning all employees who are hired to work 40 hours a week, 52 weeks a year and receive a weekly paycheck), including longshoremen,

warehousemen, equipment operators, truckdrivers, checkers, and headers employed by the Employer at the Port of Palm Beach, Riviera Beach, Florida: excluding all office clerical employees, part-time and casual employees, guards and supervisors as defined in the Act.

HEAVY LIFT SERVICES, INC.

Dated _____ By _____
(Representative) (Title

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Room 706, Federal Office Building, 500 Zack Street, P.O. Box 3322, Tampa, Florida 33602 (Tel. No. 813 — 228-2662).

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MANSION HOUSE CENTER
MANAGEMENT CORPORATION,
Respondent,

Painters Local 115, Intervenor.

No. 71-1644.

United States Court of Appeals,
Eighth Circuit
Feb. 12, 1973.

Peter G. Nash, General Counsel, Patrick Hardin, Associate General Counsel, Marcel Mallet-Prevost, Asst. General Counsel, and John D. Burgoyne and Howard J. Kaufman, Attys., N.L.R.B., Washington, D.C., for N.L.R.B.

David S. Barr, Bredhoff, Barr, Gottesman, Cohen & Peer and George Kaufmann, Washington, D. C., for Painters Local 115.

Lashly & Neun, St. Louis. Mo., for Mansion House Center Management Corp.

Before LAY, HEANEY and BRIGHT, Circuit Judges.

LAY, Circuit Judge.

[1] In our prior opinion filed September 14, 1972, 466 F.2d 1283, this court enforced the National Labor Relation Board's finding that the respondent company had violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act. We expressly reserved decision following supplemental briefing* on the remaining contention of the respondent company: whether or not the National Labor Relations Board may require an employer to bargain with a labor organization — if that organization practices racial discrimination in its membership.[1]

Today membership in a union is often the *sine qua non* for obtaining employment in most skilled crafts in this country; it frequently spells the difference between lucrative employment and exclusion from the craft.

*This court invited and received excellent supplemental briefs from the parties as well as a brief from the charging party Painters Local 115. On December 11, 1972, we granted the local union leave to intervene as a party.

[1]We reject the company's additional claim that the union should not be certified since the union "will demand" a uniform wage of 80 percent of the construction painting rate and will maintain an inflexible bargaining position. We think the company's claim premature. See Minnesota Mining & Manufacturing Co. v. N.L.R.B., 415 F.2d 174, 178 (8 Cir. 1969), where Judge Bright said:

> "On this record, we feel that the Trial Examiner correctly held: 'The mere possibility of future abuse (which indeed the Union disclaims), is no justification for an anticipatory refusal to bargain'. . . .
>
> * * * * *
>
> "In this case, the Company emitted a cry of pain before it sustained any injury."

Therefore, a union which discriminates in membership against blacks effectively deprives blacks of employment opportunities. Judge Tuttle in Culpepper v. Reynolds Metal Company, 421 F.2d 888, 891 (5 Cir. 1970), pointed out that, "[r]acial discrimination in employment is one of the most deplorable forms of discrimination known to our society, for it deals not with just an individual's sharing in the 'outer benefits' of being an American citizen, but rather the ability to provide decently for one's family in a job or profession for which he qualifies and chooses."

[2] It is well settled that the Equal Protection Clause of the Fourteenth Amendment prohibits any state, or individual acting under the color of state authority, to discriminate upon the basis of race, color or religion. The Fifth Amendment's Due Process Clause has been held to legally encompass the Equal Protection Clause of the Fourteenth Amendment, thereby placing the same constitutional limitations on federal action as restrict station action. Colorado Anti-Discrimination Commission v. Continental Airlines, Inc., 372 U.S. 714, 721, 83 S.Ct. 1022, 10 L.Ed.2d 84 (1963); Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). In Schneider v. Rusk, 377 U.S. 163, 168, 84 S.Ct. 1187, 1190, 12 L.Ed.2d 218 (1964), the Court, speaking through Mr. Justice Douglas, said: "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' " That racial discrimination is

so invidious as to be unjustifiable cannot be denied.[2] Accordingly, any recognition or enforcement or illegal racial policies by a federal agency is proscribed by the Due Process Clause of the Fifth Amendment. See Gautreaux v. Romney, 448 F.2d 731, 740 (7 Cir. 1971);

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[2]As Mr. Justice Brennan has observed:

"Government is the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct. Therefore something is uniquely amiss in a society where the government, the authoritative oracle of community values, involves itself in racial discrimination. Accordingly, in the cases that have come before us this Court has condemned significant state involvement in racial discrimination, however subtle and indirect it may have been and whatever form it may have taken. See, e. g., Burton v. Wilmington Parking Authority, supra; Evans v. Newton, 382 U.S. 296 (1966); Hunter v. Erickson, 393 U.S. 385 (1969). These decisions represent vigilant fidelity to the constitutional principle that no State shall in any significant way lend its authority to the sordid business of racial discrimination." Adickes v. S. H. Kress & Co., 398 U.S. 144, 190-191, 90 S.Ct. 1598, 1620, 26 L.Ed.2d 142 (1970) (Justice Brennan, concurring in part and dissenting in part.)

cf. Public Utilities Commission v. Pollak, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068 (1952).[3]

[3] The Board on one occasion gave recognition to these principles by directly holding that unions which exclude employees from membership on racial grounds may not obtain or retain a certified status under the Act. Independent Metal Workers Union, Local No. 1, 56 L.R.R.M. 1289, 1294 (1964).[4] Cf. Pioneer Bus Company, Inc., 51 L.R.R.M. 1546 (1962). Collective bargaining is the fulcrum of successful labor-management relations throughout the country. Our national labor policy views union membership as a necessary good to most all working men. When a union discriminates on the basis of race or color it invidiously deprives equal opportunity for employment to a large segment of working men. See Sovern, The National Labor Relations Act and Racial

[3]Of course, a union guilty of racial discrimination violates Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §2000e-2(c). In addition, the Supreme Court has made clear that unions possess an implied statutory duty of fair representation and cannot discriminate against blacks in processing grievances. Steel v. Louisville & Nashville R.R., 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944). Cf. Syres v. Oil Workers International Union, Local No. 23, rev'g 223 F.2d 739 (5 Cir. 1955). In the Fifth Circuit decision Judge Rives in dissent observed: "[I]t seems to me to follow as a necessary consequence, if the law provides automatic sanctions for the observance of the contract, then there can be no discrimination based on race or color. All men are entitled to the equal protection of the law and, except as punishment for wrongdoing, the law will not lend its aid to keep any man down, or to prevent his advancement or promotion." *Id.* at 745.

[4]The Board expressly overruled its prior decisions holding to the contrary. See Atlanta Oak Flooring Co., 16 L.R.R.M. 235 (1945); Larus & Brother Co., Inc., 16 L.R.R.M. 242 (1945).

Discrimination, 62 Colum.L.Rev. 563 (1962). When a governmental agency recognizes such a union to be the bargaining representative it significantly becomes a willing participant in the union's discriminatory practices. Although the union itself is not a governmental instrumentality the National Labor Relations Board is. N.L.R.B. v. Nash-Finch Co., 404 U.S. 138, 92 S.Ct. 373, 30 L.Ed.2d 328 (1971). Moreover, here the Board seeks judicial enforcement of its order requiring collective bargaining in a federal court. Obviously, judicial enforcement of private discrimination cannot be sanctioned. Cf. Barrows v. Jackson, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953); Hurd v. Hodge, 334 U.S. 24, 68 S.Ct. 847, 92 L.Ed. 1187 (1948); Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948).[5]

[4] We find little merit to the union's contention that the legislative history of the National Labor Relations Act indicated a clear Congressional intent to permit unions who exclude blacks from membership to use federal administrative and judicial processes to compel an employer to bargain. To the contrary, the legislative history indicates only that a union will not be in violation of §8(b)(1)(A) if it excludes Negroes from

[5]See also Oliphant v. Brotherhood of Locomotive Firemen and Enginemen, 262 F.2d 359 (6 Cir. 1958), cert. denied, 359 U.S. 935, 79 S.Ct. 648, 3 L.Ed.2d 636 (1959). See also Wellington, The Constitution, The Labor Union and "Governmental Action," 70 Yale L.J. 345 (1961).

membership.[6] The question of whether unions which practice discrimination against blacks can use administrative and judicial processes to require an

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[6]The union relies on Section 8(b)(1)(A) of the Act which makes it an unfair labor practice for a labor organization to restrain or coerce employees in exercise of their §7 rights, *"Provided,* That this . . . shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

In the Senate debate preceding passage of the Taft-Hartley Act, the following colloquy took place:

> "Mr. TAFT. . . . Let us take the case of unions which prohibit the admission of Negroes to membership. If they prohibit the admission of Negroes to membership, they may continue to do so; but representatives of the union cannot go to the employer and say 'You have got to fire this man because he is not a member of our union.' " 93 Cong.Rec. 4193 (1947).
>
> "Mr. SMITH of Virginia. . . . [The language of the bill] does not compel the union to accept any person into membership if the union does not wish to do so. . . .
>
> "It does not compel the union to admit anyone to membership or to exclude anyone from membership. . . .
>
> "It gives the union the freedom to select its own membership and exclude those employees that it prefers not to extend its membership to." *Id.* at App. 2955.

For further discussion of this history see Sovern, The National Labor Relations Act and Racial Discrimination, 62 Colum.L.Rev. 563, 583 n. 80 (1962).

employer to bargain was not discussed.[7] We conclude that the claim of racial discrimination allegedly

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[7]Certification proceedings under §9 of the Act as well as enforcement machinery relating to unfair practices under the Act were originally enacted under the Wagner Act in 1935. See The Wagner Act, ch. 372, §§9, 10, 49 Stat. 453 (1935). The legislative history relied on by the union relates primarily to the Taft-Hartley Amendments in 1947 and did not focus on the question of union recognition by the Board and the enforcement procedure under the Wagner Act.

[8]It has been suggested that it is possible that the Board's refusal to order the employer to bargain might lead to labor unrest rather than to an end to discrimination. In this regard it has been observed:

> "Nothing in the law would prevent the union from striking and picketing to force the employer to bargain with it.
>
> "But such action would probably be rare. On one side, many employers will knuckle under without a fight when the demand for recognition comes from a powerful union with majority support. On the other, given the choice between abandoning racist policies and risking their lives in recognition strikes, some unions will surely choose to cease discriminating. In almost all cases, this will be the choice urged by international unions, for few internationals now espouse racial discrimination. In fact, where racism is operative, it is frequently the choice of a local acting in defiance of a contrary policy stated but not vigorously enforced by its international. The fresh handicap to organizational efforts that Board abstention would represent might well cause internationals to exert real pressure to get stray locals into line. The result might then be not new labor unrest but new nondiscriminatory policies for heretofore lily-white unions."
>
> Sovern, The National Labor Relations Act and Racial Discrimination, 62 Colum.L.Rev. 563, 607-608 (1962).

practiced by a union seeking recognition as a representative bargaining unit under the Act is a relevant area of inquiry for the Board when the defense is appropriately raised before the Board upon a company's refusal to bargain.

There is a question whether the company here raises the issue of racial discrimination in good faith. The record demonstrates that the company did not suggest discriminatory practices to the union as the reason for its refusal to bargain. Nevertheless, aside from the public policy and national interests involved, we think constitutional limitations on the Board's process require recognition of a charge of racial discrimination as an appropriate ground of inquiry where a union's representative capacity is questioned. On the other hand, it should be clear that a refusal to bargain based on a union's alleged racial discrimination must not rest on pretextual grounds. The law in this area needs to be more fully developed by the Board. Prophylactic procedures may be needed by the Board to deter pretextual refusal to bargain with an authorized unit on the alleged grounds that the union is practicing discrimination in its membership. We leave this for the Board to work out.[8] The Board seemingly recognizes its obligation but here rejects the charge on the ground that insufficient evidence exists to justify the company's challenge. We turn then to the record.

At the hearing the examiner *excluded* the evidence as to the alleged union's practices of racial discrimination. The exclusion of the evidence was based on the examiner's appraisal of the company's offer of proof. The company attempted to prove that the union's

jurisdictional territory (the St. Louis metropolitan area) is fifty percent non-white; the union has approximately 375 active members, only three of whom are black; these three black members became members by transferring from a former Negro Local when the latter disbanded in 1968; no other black before or since has ever joined the union. The examiner in rejecting the evidence emphasized that there was no restriction within the Local's by-laws or constitution and that the evidence would have to establish in "actual practice" that the union had received membership applications and had rejected them on racial grounds.

The Board agreed with the examiner and observed:

> "We agree, for the offer of proof turns primarily on the asserted fact of racial imbalance in the Union's membership but does not allege the Union has, since segregated locals were abolished in 1968, denied membership to any applicant on grounds of race. Furthermore, it is of some relevance here that one of Respondent's employees signed up the Union was a Negro.
>
> "In view of the foregoing considerations, Respondent's motion to reopen the record is denied."[9]

[5, 6] We find the trial examiner erred in not receiving the evidence. The evidence was relevant and material. We further find that the Board erroneously

[9]Before the Board the respondent asked leave to present additional evidence relating to the union's practices.

viewed the evidence and applied the wrong standard as to whether the union may be properly certified in face of charges of racial discrimination.

The Board failed to give any credence to the tendered evidence in weighing whether the union is significantly involved with invidious discriminatory practices. Both the trial examiner and the Board observed that mere statistics were insufficient to establish de facto segregation. In Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8 Cir. 1970) (a Title VII claim of racial discrimination in employment), the plaintiff relied on employment statistics to support his claim of racial discrimination. For example, there were only 56 blacks out of a total work-force of 3,074 or 1.82 percent of the work-force, and no blacks had been placed as craftsmen, draftswomen or in sales. Responding to these figures, this court held:

> "The statistical evidence introduced by Parham clearly demonstrated the Company's discriminatory employment practices from July 2, 1965, until February, 1967, notwithstanding its previously-announced policy of equal employment opportunities.
>
> . . . . .
>
> "We hold as a matter of law that these statistics, which revealed an extraordinarily small number of black employees, except for the most part as menial laborers, established a violation of Title VII of the Civil Rights Act of 1964."

Similarly, in Marquez v. Omaha District Sales Office, Ford Division, 440 F.2d 1157 (8 Cir. 1971), another fair employment practice case under Title VII, this Court considered geographical statistical data as a crucial factor in finding a prima facie case of racial discrimination.

In Turner v. Fouche, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970), the Supreme Court was faced with the question of whether Negroes had been eliminated from juries on account of their race. The Court concluded:

> "In sum, the appellants demonstrated a substantial disparity between the percentages of Negro residents in the county as a whole and of Negroes on the newly constituted jury list. They further demonstrated that the disparity originated, at least in part, at the one point in the selection process where the jury commissioners invoked their subjective judgment rather than objective criteria. The appellants thereby made out a prima facie case of jury discrimination, and the burden fell on the appellees to overcome it." 396 U.S. at 360, 90 S.Ct. at 540.

See also Bing v. Roadway Express, Inc., 444 F.2d 687, 689 (5 Cir. 1971); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 247 (10 Cir. 1970), cert. denied, 401 U.S. 954, 91 S.Ct. 972, 28 L.Ed.2d 237 (1971).

However, notwithstanding the effect of the evidence offered, we find both the trial examiner and the Board

erred in testing the discrimination charge on the sole ground as to whether any non-whites had been refused membership in the union since 1968. This appraisal may be completely unrealistic as to whether racial discrimination does in fact exist. Such a test has been specifically rejected by this court in Title VII cases.[10] Parallel principles in other areas may be viewed. School districts which practiced segregation in the past early insisted that since segregation policies had been repealed the segregated status quo was permissible since they no longer were practicing illegal policies. See Kemp

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[10]As set forth in United States v. Sheet Metal Workers, 416 F.2d 123, 127 (8 Cir. 1969):

> "The government . . . argues that it is not necessary to prove that a number of Negroes sought and were denied union membership or related benefits to establish a pattern or practice of discrimination. It asserts that the Act casts upon those subject to its provisions not merely the duty to follow racially neutral employment policies in the future but an obligation to correct or revise practices which would perpetuate racial discrimination."

In agreeing with the government's position we observed, at 132:

> "The record does show that qualified Negro tradesmen have been and continue to be residents of the area. It further shows that they were acutely aware of the Locals' policies toward minority groups. It is also clear that they knew that even if they were permitted to use the referral system and become members of the union, they would have to work for at least a year before they could move into a priority group which would assure them reasonably full employment. In the light of this knowledge, it is unreasonable to expect that any Negro tradesman working for a Negro contractor or a non-construction white employer would seek to use the referral systems or to join either Local."

v. Beasley, 389 F.2d 178 (8 Cir. 1968). However, "freedom of choice" plans have generally failed because of the "frozen status" of the segregated student community. See Green v. County School Board of New Kent County, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968). In Title VII cases where present employment practices "serves to perpetuate the effects of past discrimination, although neutral on its face, [they] rejuvenate the past discrimination in both fact and law regardless of present good faith." Marquez v. Omaha District Sales Office, Ford Division, 440 F.2d 1157, 1159-1160 (8 Cir. 1971). As Chief Justice Burger said in Griggs v. Duke Power Co., 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971): "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." The same principles apply in the evaluation of the charge of discrimination here. Thus, statistical evidence may well corroborate and establish that a union has been guilty of racial practices in the past. In face of such proof, passive attitudes of good faith are not sufficient to erase the continuing stigma which may pervade a union's segregated membership policies. The fact that no minority applicant has been rejected by the union is not the sole test. When evidence suggests discrimination of racial imbalance the Board should inquire whether the union has taken the initiative to affirmatively undo its discriminatory practices. The admission policies of the union, the methods employed processing applicants, and the means utilized to publicize integrated membership and equal opportunity are only a few of the factors which deserve full scrutiny. Cf. United States v. Sheet Metal Workers, 416 F.2d at 140.

[7, 8] In substance we hold the remedial machinery of the National Labor Relations Act cannot be available to a union which is unwilling to correct past practices of racial discrimination. Federal complicity through recognition of a discriminating union serves not only to condone the discrimination, but in effect legitimizes and perpetuates such invidious practices. Certainly such a degree of federal participation in the maintenance of racially discriminatory practices violates basic constitutional tenets.

Since the trial examiner failed to admit into evidence critical facts and the Board applied an erroneous standard in evaluating that evidence, we vacate the Board's order requiring recognition of the union and the order requiring the company to bargain. We remand these issues to the Board with direction that the company should be given leave to adduce further proof on its tendered defense. The charging party (the union) may thereafter offer whatever rebuttal testimony and documentary proof it deems necessary for the Board's consideration. After reviewing all of the examiner's findings and all of the evidence, the Board should then determine whether the disqualification complaint is supported by substantial evidence. If it is not, the 8(a)(5) violation should be reinstated and the company ordered to bargain; if substantial evidence is adduced, the Board's finding should so state. Nothing written here shall in any way be read to reflect on the continuing statutory rights of employees to seek union representation under §7 of the Act.

We have heretofore enforced that portion of the Board's order, finding 8(a)(3) violations and ordered

reinstatement and back pay; we herein deny enforcement of the 8(a)(5) violation and deny enforcement of the bargaining order; the cause is remanded to the Board to be reopened in accord with this opinion.

Supreme Court, U. S.
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No. 79-1655

In the Supreme Court of the United States

OCTOBER TERM, 1979

HEAVY LIFT SERVICES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 13-19) is reported at 607 F. 2d 1121. The decision and order of the National Labor Relations Board (Pet. App. 1-16) are reported at 234 N.L.R.B. 1078 (1978).

JURISDICTION

The judgment of the court of appeals was issued on January 3, 1980. On March 25, 1980, Mr. Justice Powell granted an extension of time in which to file a petition until April 22, 1980. The petition for a writ of certiorari was filed on April 21, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that petitioner's unsupported allegations of race discrimination by a union failed to raise disputed factual issues which precluded the General Counsel's motion for summary judgment.

STATEMENT

1. Pursuant to a stipulation for certification upon consent election executed by petitioner and Local 1680 of the International Longshoremen's Association ("the Union"), the Board conducted an election among petitioner's employees on October 26, 1973, which the Union won by a vote of 11 to 10. Petitioner filed timely objections to conduct affecting the results of the election. Following a hearing on certain of petitioner's objections, including an allegation that the Union had engaged in a campaign based on appeals to racial prejudice, the Board overruled the objections in their entirety and certified the Union as the bargaining representative of the unit employees (Pet. App. 4, 22-24).

2. Thereafter, on charges brought by the Union that petitioner had refused to bargain, an unfair labor practice complaint issued. Following receipt of petitioner's answer, the General Counsel moved for summary judgment. In an amended answer filed in response to the General Counsel's motion, petitioner denied that the Union had requested bargaining and raised for the first time, as an affirmative defense, the assertion that "the Union does now, and has in the past * * *, engaged in unlawful, illegal, and discriminatory racial practices as to employee and membership practices as to disqualify it from being certified as a labor organization within the meaning of Section 2(5) of the Act and to preclude it from remedial relief from a governmental agency." Petitioner submitted no evidence in support of its allegations of discrimination.

(Pet. App. 3.) However, because petitioner's answer raised disputed factual issues with respect to the Union's request to bargain and petitioner's refusal, on October 6, 1975, the Board ordered that a hearing be held to resolve that issue. With respect to petitioner's affirmative defense of union discrimination, however, the order stated (Pet. App. 3-4):

> [Petitioner's] request for a hearing on its affirmative defense that the Union is not entitled to certification because it has engaged in discriminatory conduct is denied. Mere unsupported allegations of the Union's having engaged in such conduct, without more, are insufficient to raise factual issues warranting a hearing * * *. [Footnotes omitted.]

Petitioner did not file a motion for reconsideration of the Board's order (Pet. App. 4).[1]

At the subsequent hearing, the administrative law judge declined to admit evidence relevant to petitioner's affirmative defense of union discrimination ruling that petitioner was precluded from litigating that issue as a result of the Board's October 6 order (Pet. App. 4).[2] As to the issues in dispute, the judge found that the Union had requested bargaining and petitioner had refused to bargain. He concluded that petitioner's conduct violated Section 8(a)(5) and (1) of the Act and recommended that petitioner be required to recognize and bargain with the Union. (Pet. App. 17-35.)

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[1]Board Rules and Regulations, Section 102.48(d)(1) provide that any material error in the Board's decision may be asserted through a motion for "reconsideration, rehearing, or reopening the record." See *Garment Workers* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

[2]The judge did, however, permit petitioner to make a full offer of proof for the record (Pet. App. 4).

The Board (Member Jenkins dissenting) upheld the decision of the administrative law judge and issued, *inter alia*, a bargaining order. The Board agreed with the judge that petitioner was foreclosed from litigating the issue of alleged union discrimination during the unfair labor practice hearing. The Board explained that (Pet. App. 5-6):

> A motion for summary judgment is one of several traditional means by which adverse parties may be put to the test of their allegations prior to a full evidentiary hearing. Although the General Counsel bears the burden of proving all elements of an unfair labor practice violation in Board proceedings, the initial burden of proceeding with proof of an affirmative defense rests with [petitioner].
>
> The General Counsel's Motion for Summary Judgment on the complaint in this case was supported by relevant exhibits. [Petitioner's] reply in opposition and amended answer successfully controverted certain elements of the complaint, thereby establishing the existence of factual issues necessitating a hearing. [Petitioner] did not, however, offer any evidence to the Board in support of the affirmative defense, raised for the first time in its amended answer, that the Union has engaged in illegal racial discrimination.
>
> [B]ecause [petitioner] failed to support its affirmative defense allegation when procedurally compelled to do so, there was no factual issue thereafter to be litigated with respect to this defense.

In addition, the Board found that petitioner was precluded from litigating the issue of union discrimination at the unfair labor practice hearing because it had failed to raise the issue during the underlying representation

proceeding and had made no showing that its alleged evidence was unavailable and could not have been discovered prior to the Board's October 6 order (Pet. App. 7). The Board did not reach the issue of whether properly supported allegations of invidious racial discrimination by a union could have been raised in the instant proceeding because petitioner's allegations were not properly substantiated (*ibid.*).

3. The court of appeals enforced the Board's bargaining order, agreeing with the Board that petitioner was not entitled to a hearing on the issue of racially discriminatory union practices because "the allegation was not supported by sufficient evidence to overcome a motion for summary judgment" (Pet. 18). The court explained that:

> A motion for summary judgment puts adverse parties to the test of their allegations prior to a full evidentiary hearing. As the Board noted in its original order denying a hearing on the Union discrimination charges, "mere unsupported allegations of the Union's having engaged in such conduct, without more, are insufficient to raise factual issues warranting a hearing." In its affirmative defense to the motion for summary judgment, [petitioner] failed to support its allegations with the minimal evidence necessary to show that a factual issue existed to necessitate a hearing. Without a "properly substantiated" prima facie showing of racial discrimination by the Union, [petitioner] was not entitled to a hearing on this affirmative defense. [Citations omitted.]

Citing its decision in *NLRB* v. *Sumter Plywood Corp.*, 535 F. 2d 917 (5th Cir. 1976), cert. denied, 429 U.S. 1092 (1977), the court added:

> [t]his Court will deny enforcement of a Board order on the grounds that the Board improperly refused a hearing on whether the union was racially discriminatory only when the employer has proffered specific evidence sufficient to demonstrate a pattern of racially discriminatory behavior by the union which would support a finding of a definite propensity for racially unfair representation. (Pet. 18-19.)[3]

ARGUMENT

Petitioner contends that the Board may not constitutionally uphold the certification of, or extend remedial relief to, a union which discriminates unlawfully on the basis of race (Pet. 22). That question, however, is not presented in this case because the Board, upheld by the court of appeals, found that petitioner failed to support its allegations of race discrimination with the minimal evidence necessary to overcome a motion for summary judgment.[4]

While the party who moves for summary judgment has the initial burden of showing that there is no genuine issue as to the material facts entitling it to relief, if the moving party carries its preliminary burden, then the opposing party may not defeat the motion by relying on the

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[3]The court noted, however, that ~~the~~ had petitioner's claim of invidious racial discrimination been supported by specific evidence, it would properly have been brought before the Board during the proceedings on the refusal to bargain (Pet. 19).

[4]While the Board's Rules and Regulations do not contain a rule as detailed as Rule 56, Fed. R. Civ. P., the Board's Rules, Sec. 102.24 and 102.50, do allow for summary judgment and its use has long been approved by the courts. See, for example, *N.L.R.B* v. *Tennessee Packers, Inc.*, 379 F. 2d 172, 177-179 (6th Cir.), cert. denied, 389 U.S. 958 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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